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Trafficking in persons, especially women and children

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, submitted in accordance with Human Rights Council resolution 26/8.

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Report of the Special Rapporteur on trafficking in persons, especially women and children

Summary

The due diligence principle is a well-established component of a State's obligations to address acts by private actors by preventing and protecting victims against such abuses, punishing the perpetrators, and ensuring remedies for victims. As it is non-State actors who most often perpetrate trafficking, the application of States' due diligence obligations concerning non-State actors is particularly critical to ensure the rights of trafficked persons. The failure to exercise due diligence is consequential, meaning that States that have failed to exercise due diligence towards private actors incur international responsibility that then requires them to provide an effective remedy for victims. Previous reports of the mandate holder on trafficking in persons, especially women and children, have identified elements of States' due diligence obligations, including in the identification of trafficked persons, the prevention of trafficking, and the provision of remedies. Due diligence obligations have also been identified in a number of areas that are of direct relevance — and in some cases directly apply — to trafficking, including violence against women, migrant workers, and sex-based discrimination.

Building on these explanations of the nature and scope of due diligence obligations, the present report addresses a series of legal and operational questions about what due diligence on trafficking in persons requires of States with respect to non-State actors. In addition to examining the obligations of States as duty-bearers, it also includes good practices and recommendations on the role of non-State actors themselves in the due diligence framework. Specifically, the report identifies core components of due diligence with regard to six areas: the prevention of trafficking in persons; the obligations to identify, assist and support victims; criminalization, investigation, prosecution and punishment; remedies; inter-State cooperation and institutions; and due diligence of non-State actors such as business enterprises.

In each of these areas several cross-cutting issues of particular importance to combating trafficking in persons are discussed, including extraterritoriality, resources, the need for greater emphasis on and a wider understanding of the preventive arm of due diligence, and due diligence in crisis contexts. The report also provides a number of concrete examples of good practices in due diligence, while at the same time emphasizing that due diligence is neither a one-size-fits-all standard nor a box-ticking exercise. Rather, meaningful and substantive human rights due diligence provides a necessary framework to ensure policy coherence between anti-trafficking policy and related policy areas such as immigration and labour-market policies and is core to ensuring a human rights-based approach to trafficking in persons.

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I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 26/8, paragraph 2 (k). It outlines the activities of the Special Rapporteur on trafficking in persons. The thematic focus of the report is due diligence and trafficking in persons.

II. Activities carried out by the Special Rapporteur

A. Participation in conferences and consultations[1]

2. On 13 and 14 April 2015, the Special Rapporteur took part in four events at the thirteenth United Nations Congress on Crime Prevention and Criminal Justice, held in Doha. On 13 April, she delivered opening remarks at the ancillary meeting on preventing labour trafficking and exploitation of migrant workers", organized by the European Institute for Crime Prevention and Control, affiliated with the United Nations. On 14 April, she delivered a keynote address during a high-level event on the United Nations Trust Fund for Victims of Trafficking in Persons. She was also a panellist in the ancillary meeting on United Nations Office on Drugs and Crime Issue Papers exploring the concepts of "abuse of a position of vulnerability", "consent" and "exploitation" within the definition of trafficking in persons. Moreover, she took part in a workshop entitled "Trafficking in persons and smuggling of migrants: successes and challenges in criminalization, mutual legal assistance and in the effective protection of witnesses and trafficking vic ims". She had several bilateral meetings, including with the United Kingdom Independent Anti-Slavery Commissioner and the Prime Minister of Qatar, based in Geneva.

3. On 18 and 19 May 2015, she convened an Expert Group Meeting on due diligence in Geneva that fed into the present report.

4. On 16 June 2015, the Special Rapporteur presented her first report at the twenty-ninth session of the Human Rights Council, outlining her vision for the mandate and the thematic priorities she intends to focus on, including the link between trafficking, migration and conflicts and the prevention of trafficking, with a particular focus on trafficking for labour exploitation. She also took part in a number of side-events.

5. The mandate holder also participated in a number of conferences and meetings over the past year, at the invitation of State and non-State actors.

B. Country visits

6. The Special Rapporteur visited Malaysia from 23 to 28 February 2015, at the invitation of the Government (see A/HRC/29/38/Add.1). She wishes to express her thanks to the Government for its cooperation prior to and during the visit.

7. The due diligence principle is a well-established component of a State's obligations under general international law and specific human rights covenants to address acts by private actors by preventing and protecting victims against such

[1] For activities between October 2014 and March 2015, see A/HRC/29/38, paras. 2-5.

abuses, punishing the perpetrators and ensuring remedies for victims. As it is non-State actors who most often perpetrate trafficking, the application of States' due diligence obligations concerning non-State actors is particularly critical to ensure the rights of trafficked persons.[2] As a human rights obligation, States' due diligence obligations apply without discrimination to all individuals within its territory or effective control, including citizens and non-citizens,[3] individuals trafficked for sex, labour, organ removal, and other forms of trafficking, and regardless of whether the State is one of origin, transit and/or destination. The failure to exercise due diligence is consequential, meaning that States that have failed to exercise due diligence towards private actors incur international responsibility that then requires them to provide an effective remedy for victims of trafficking in persons.[4]

8. The exercise of due diligence in anti-trafficking is critical to achieving a comprehensive and integrated approach to ensuring the human rights of trafficked persons and persons at risk of being trafficked. Accordingly, previous reports of the mandate holder on trafficking in persons, especially women and children, have identified elements of States' due diligence obligations, including in the identification of trafficked persons,[5] the prevention of trafficking,[6] and the provision of remedies.[7]

9. Despite regulations set out in international instruments and decades of anti-trafficking initiatives, significant protection gaps persist in practice for victims of trafficking in persons.[8] As such, there is further and much-needed scope to detail the extent and content of due diligence on trafficking in order to better equip States to meet their obligation under international human rights law to exercise due diligence to prevent trafficking, to investigate and prosecute traffickers, to assist and protect victims of trafficking in persons, and to provide access to remedies. Meaningful and substantive human rights due diligence provides a necessary framework to enable all stakeholders to re-examine both the trafficking and anti-trafficking landscape, to revise — where necessary — anti-trafficking legislation and policies, and to ensure policy coherence between anti-trafficking policy and related policy areas such as immigration and labour-market policies.

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[2] See A/67/261, para. 7. While the principle of due diligence has been referenced in relation to harms committed by State or non-State actors (see e.g., Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-American Commission on Human Rights, Report No. 80/11, para. 122). The present report focuses on human rights due diligence standards vis-à-vis private actors.

[3] See Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant (CCPR/C/21/Rev.1/Add.13, para. 10); Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/GC/28, para. 12); ibid., General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations (CEDAW/C/GC/30, para. 2).

[4] See, e.g., Human Rights Council, General Comment No. 31, para. 8; Committee against Torture, General Comment No. 2, Implementation of article 2 by States Parties (CAT/C/GC/2), para. 18; Committee against Torture, General Comment No. 3, Implementation of article 14 by States parties (CAT/C/GC/3), para. 7; A/HRC/26/18, annex, para. 2.

[5] A/HRC/17/35/Add.6, para. 65. See also Zhen Zhen Zheng v. Netherlands, CEDAW/C/42/D/15/2007, paras. 8.1-9.1.

[6] A/HRC/26/37, para. 55; A/HRC/23/48, paras. 62, 84.

[7] A/66/283, paras. 12, 31; A/HRC/17/35; A/HRC/26/18, annex, para. 2.

[8] See, e.g., A/HRC/26/37/Add.2.

10. Accordingly, this report addresses a series of legal and operational questions about what due diligence on trafficking in persons requires of States. In addition to examining the obligations of States as duty-bearers, it also includes good practices and recommendations on the role of non-State actors themselves in the due diligence framework. It is not, however, the goal of the present report to develop a list of measures that comprise due diligence or to summarize all the existing guidance on good practices in the anti-trafficking context concerning private actors. Due diligence is neither a one-size-fits-all standard nor a box-ticking exercise, but is instead core to ensuring a comprehensive human-rights-based approach to addressing trafficking in persons by States and non-State actors. Instead, the present report identifies key cross-cutting considerations and particularly pressing human rights issues in addressing all areas of anti-trafficking practices, including the "5Ps" (Protection, Prosecution, Punishment, Prevention, Promoting international cooperation and partnership including public and private partnership), the "3Rs" (Redress, Recovery (Rehabilitation) and Reintegration), and the "3Cs" (Capacity, Cooperation and Coordination) as developed previously by the mandate holder.[9]

III. Due diligence and trafficking in persons: scope and application

A. Due diligence under international human rights law: general points

11. Under international human rights law, States have an obligation to protect against human rights abuse by private actors.[10] This is understood as a positive obligation requiring States to take a range of measures to ensure that third parties do not interfere with human rights guarantees.[11] The content of the human rights due

[9] See, e.g., footnote 8.

[10] See, e.g., *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-American Court of Human Rights (ser. C) No. 4, para. 172 (identifying the due diligence principle as follows: "[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention [on Human Rights]."). See also Human Rights Council, General Comment No. 31, para. 8; Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, para. 9; CEDAW General Recommendation No. 28, para. 13; CEDAW General Recommendation No. 30, para. 15; Committee against Torture, General Comment No. 3, para. 7; Committee against Torture, General Comment No. 2, para. 18; Committee on Economic, Social and Cultural Rights, General Comment No. 12, Right to adequate food (E/C.12/1999/5, para. 15); Committee on the Rights of the Child, General Comment No. 13, The right of the child to freedom from all forms of violence, CRC/C/GC/13, para. 5.

[11] Ibid. and infra notes 12 and 13.

diligence principle has been affirmed and articulated by regional[12] and international human rights bodies.[13]

B. Due diligence under international human rights law: trafficking in persons and related areas (e.g., violence against women)

12. In addition to these general statements concerning due diligence, due diligence obligations on trafficking in persons specifically have also been identified. For example, in addition to the prior reports of this mandate holder and of other special procedures,[14] Principle 2 of the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking also provides that "States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons."[15] In the European human rights system, the standard of "positive obligations" has been specifically applied to measure when a State can be held responsible for private acts of human trafficking in the case of *Rantsev v. Cyprus and Russia* (2010).[16]

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[12] In addition to *Velásquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights and Inter-American Commission on Human Rights opinions/decisions that address the due diligence principle include, e.g., *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-American Commission on Human Rights, Report No. 54/01, Organization of American States/Ser. L/V/II.111, doc. 20 rev. (2000); *González et al. v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-American Court of Human Rights (ser. C) No. 205 (Nov. 16, 2009); *Jessica Lenahan (Gonzales) v. United States* (2011). For example, in the European system, this is through the concept of positive obligations as articulated in a series of cases, including *X and Y v. the Netherlands*, 91 European Court of Human Rights (ser. A) 27 (1985); Osman v. United Kingdom, App. No. 23452/84, European Court of Human Rights (1998); Akkoc v. Turkey, App. No. 22947/93, 22948/93, European Court of Human Rights (2000); *Z and Others v. United Kingdom*, App. No. 29892/95, European Court of Human Rights (2001); *E and Others v. United Kingdom*, App. No. 33218/96, European Court of Human Rights (2002); *M. C. v. Bulgaria*, App. No. 39272/98, European Court of Human Rights (2003); *Opuz v. Turkey*, App. No. 33401/02 European Court of Human Rights (2009); *Rantsev v. Cyprus and Russia*, App. No. 25965/04, European Court of Human Rights (2010). See also in the African regional human rights system, African Commission on Human and Peoples' Rights, 245/02, Zimbabwe Human Rights NGO Forum v. Zimbabwe (2006); African Commission on Human and Peoples' Rights, application 55/96, SERAC and CESR v. Nigeria, 15th Annual Activity Report of the African Commission on Human and Peoples' Rights (2002), para. 46; African Commission on Human and Peoples' Rights, application 74/92, Commission Nationale des Droits de l'Homme et des Libertés v. Chad, 9th Annual Activity Report of the African Commission on Human and Peoples' Rights (1995-96), 4 IHRR 94 (1997).

[13] International bodies and instruments have also affirmed and explained the duty in general terms. In addition to sources cited supra in note 10, see, e.g., art. 4 (c) of the Declaration on the Elimination of Violence against Women, General Assembly resolution 48/104 (1993) and para. 124 (b) of the Beijing Declaration and Platform for Action adopted by the Beijing Fourth World Conference on Women, which both reaffirmed this principle (*Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995*, annexed to A/CONF.177/20/Rev.1 (1995)).

[14] See, e.g., E/CN.4/2000/68.

[15] See Office of the United Nations High Commissioner for Human Rights (OHCHR), Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1) Principle 2. Note also OHCHR Recommended Principles, Principle 6 ("States shall exercise due diligence in identifying and eradicating public-sector involvement or complicity in trafficking").

[16] *Rantsev v. Cyprus and Russia*, App. No. 25965/04, European Court of Human Rights (2010).

13. Additionally, due diligence obligations have been identified in a number of areas that are of direct relevance — and in some cases directly apply — to trafficking, including violence against women,[17] migrant workers,[18] and sex-based discrimination.[19] In addition to due diligence requirements in international human rights law, due diligence standards in areas such as "environmental protection, consumer protection and anti-corruption,"[20] are also relevant to addressing trafficking in persons.

C. Application of due diligence and trafficking in persons

14. Alongside human rights due diligence standards on trafficking involving private actors, other areas of international law also contain obligations that specifically address trafficking by non-State actors. In particular, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (United Nations Trafficking Protocol) as a Protocol to the United Nations Convention against Transnational Organized Crime requires States to undertake to prevent trafficking, protect victims, and prosecute trafficking in persons by private individuals, including by providing the possibility for victims to access compensation.[21] In considering whether a State has acted diligently, it will be relevant to consider whether it is bound by any of these other international obligations on trafficking by non-State actors, such as through the United Nations Trafficking Protocol or regional instruments.[22] A better understanding of the content of the human rights obligations of due diligence on trafficking can also help ensure that States comply with human rights in implementing these other anti-trafficking obligations and to develop complementary protections for trafficked persons.

15. The due diligence obligation to protect individuals from traffickers also often intersects and overlaps with other areas of State obligations (e.g., in relation to

[17] See, e.g., Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, Violence against women (A/47/38 at page 1, para. 9), reprinted in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies (HRI/GEN/1/Rev.6 at 243 (2003); *Şahide Goekce (deceased) v. Austria* (CEDAW/C/39/D/5/2005; *Fatma Yildirim (deceased) v. Austria* (CEDAW/C/39/D/6/2005). See also Hearing Submission: *Jessica Lenahan (Gonzales) v. United States*, presented by the United Nations Special Rapporteur on violence against women, its causes and consequences to the Inter-American Commission on Human Rights; A/HRC/23/49; E/CN.4/2006/61; E/CN.4/2000/68; E/CN.4/1996/53. See further Zarizana Abdul Aziz and Janine Moussa Due Diligence Project, Co-Directors, "Due Diligence Framework State Accountability Framework for Eliminating Violence against Women" (2014), available at http://www.duediligenceproject.org/Home.html.

[18] See, e.g., Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-American Court of Human Rights (ser. A) No. 18 (Sept. 17, 2003).

[19] See, e.g., Committee on the Elimination of Discrimination against Women, General Recommendation No. 28, para. 13.

[20] See, e.g., Olivier De Schutter, et al., *Human Rights Due Diligence: The Role of States* 4 (2012), available at http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf.

[21] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000) (United Nations Trafficking Protocol), art. 6(6); United Nations Convention against Transnational Organized Crime (Organized Crime Convention), art. 25(2).

[22] See, e.g., *Rantsev v. Cyprus and Russia* (2010).

activities of public institutions). For example, State failures to respect and fulfil human rights in non-discrimination, labour, migration, and education create the conditions conducive to trafficking by third parties.[23] By requiring a human rights-based approach, due diligence enables States to apply all their international obligations in ways that encourage less compartmentalization and more holistic approaches to trafficking to ensure the realization of human rights.[24]

16. The territorial and extraterritorial application of human rights[25] means that States' due diligence obligations apply extraterritorially to those within their jurisdiction, including domestic non-State actors (e.g., corporations).[26] These obligations apply when States exercise "effective control" either when acting individually (e.g., in unilateral military action) or as members of international or intergovernmental organizations and coalitions (e.g., in peacekeeping forces).[27] Due diligence human rights obligations also apply in peacetime, conflict, and post-conflict situations.[28] In practice, however, States, inter-State, and non-governmental actors often overlook trafficking in crisis situations (e.g., armed conflicts, natural disasters and protracted crises), creating significant protection gaps that leave "forms of trafficking unaddressed and victims unassisted."[29] While State actors have due diligence obligations in crisis contexts, under certain circumstances, non-State actors (e.g., armed groups) will themselves be required to address international human rights, including the obligations of due diligence.[30] For example, while non-State actors such as armed groups cannot ratify international human rights treaties, "under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights."[31]

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[23] A/HRC/23/48, para. 62.

[24] A/HRC/23/49, para. 18.

[25] See, e.g., Human Rights Council, General Comment No. 31, para. 10; Committee against Torture, General Comment No. 2, paras. 7, 16; Committee on the Elimination of Discrimination against Women, General Recommendation No. 28, para. 12; Committee on the Elimination of Discrimination against Women, General Recommendation No. 30, paras. 8-10, 15; Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2005, p. 168, paras. 216-217.

[26] See, e.g., Committee on the Elimination of Discrimination against Women, General Recommendation No. 30, paras. 8-12.

[27] See e.g., supra note 25.

[28] See, e.g., Committee on the Elimination of Discrimination against Women, General Recommendation No. 30, para. 9 ("In conflict and post-conflict situations, States parties are bound to apply the Convention and other international human rights and humanitarian law"; Human Rights Council, General Comment No. 31, para. 11 ("the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.").

[29] International Organization for Migration, *Addressing Human Trafficking and Exploitation in Times of Crisis — Evidence and recommendations for further action to protect vulnerable and mobile populations* 7 (2015), available at https://www.iom.int/sites/default/files/press_release/file/CT_in_Crisis_FINAL.pdf.

[30] See Committee on the Elimination of Discrimination against Women, General Recommendation No. 30, para. 16.

[31] Ibid.

D. Due diligence as an obligation of conduct

17. Due diligence is too often limited in practice because it is seen as requiring resources and State capacity to control private actors. This can give rise to questions about the role of due diligence in contexts where capacities of States are diminished (e.g., in conflict or crisis) or where States' capacities to protect human rights from acts of third parties have not kept pace with the rise of powerful private actors, such as corporations and other non-State actors such as armed groups. Because due diligence is an obligation of conduct,[32] it does not insist on a one-size-fits-all approach that requires uniform outcomes from differently situated States. As an obligation of conduct, however, due diligence does require "States to take reasonable measures that have a real prospect of altering the outcome or mitigating the harm."[33] States are also required to undertake substantive review and assessment policies to test results and effectiveness, including whether they are taking appropriate measures to ensure the human rights of trafficked persons. This requirement of due diligence assessment is particularly important when potential infringements come from failures of the State to act with regard to non-State actors as omissions can be particularly difficult to measure.[34]

18. The requirement that due diligence be exercised in good faith[35] — meaning the taking of "positive steps and measures by States"[36] — also means that a lack of resources or capacity cannot completely shield States from their due diligence obligations. Indeed, often, it is not more resources but rather their reallocation — including towards preventative policies — that is needed for States to act diligently as assessed under the particular circumstances. For many States' anti-trafficking policies, the "form in which due diligence has thus far been pursued is not without alternatives;"[37] due diligence requires pursuing these alternatives to maximize efforts to ensure the human rights of trafficked persons in all aspects of anti-trafficking responses. While in practice some of these efforts to ensure the human rights of trafficked persons may be implemented by non-State actors (e.g., through civil society-run assistance programmes), States cannot delegate their due diligence obligations.[38]

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[32] A/HRC/23/49, para. 16 ("The general opinion is that it is one of conduct, however, failure of conduct will likely constitute failure of result.").

[33] Ibid., para. 72.

[34] Ibid., para. 13.

[35] See, e.g., E/CN.4/2006/61, para. 36 ("Due diligence obligation must be implemented in good faith ...This will necessarily entail taking positive steps and measures by States"); E/CN.4/2000/68, para. 53.

[36] E/CN.4/2006/61, para. 36.

[37] Aoife O'Donoghue, "The exercise of governance authority by international organisations: The role of due diligence obligations after conflict", in Matthew Saul, James A. Sweeney (eds.), *International Law and Post-Conflict Reconstruction Policy* 50 (2015).

[38] E/CN.4/2006/61, para. 34.

IV. Due diligence and trafficking in persons: operationalizing core elements

A. Due diligence and the prevention of trafficking in persons

19. In practice, due diligence has been applied mainly as a reactive obligation, often leading States to focus on post-hoc anti-trafficking measures, such as investigation and prosecution of trafficking. Instead, properly constituted, the due diligence standard enables States to take a proactive and long-term approach that focuses, for example, more closely on the prevention arm of due diligence. It also requires States to take a holistic approach that evaluates how due diligence in each of the different areas of anti-trafficking — such as prevention, prosecution, and punishment — interact with each other. For example, providing adequate protection and assistance to victims of trafficking in persons after they have been identified is also often necessary to prevent instances of retrafficking. Due diligence should be taken into account before, during and after each anti-trafficking intervention by not only considering each individual measure on its own terms, but also how it intersects with other anti-trafficking efforts.

20. Due diligence on preventing trafficking also requires action to address the wider, more systemic processes or root causes[39] that contribute to trafficking in persons, such as inequality, restrictive immigration policies, and unfair labour conditions, particularly for migrant workers.[40] As such, the present mandate holder has previously emphasized that international law "requires that States act with due diligence to prevent trafficking and the human rights violations with which it is associated,"[41] including to address demand,[42] such that due diligence "on the part of States should require action on these wider processes, all of which foster demand for, and vulnerability to, trafficking."[43] Additionally, *Rantsev v. Cyprus and Russia*, has clarified that as part of the positive obligation to address trafficking "a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking."[44] Often, however, States adopt immigration policies in the name of preventing trafficking that in practice deter movement; instead of being preventative, these policies make transborder movement more perilous and foster situations that lead to trafficking.

21. To counter these and other effects, due diligence requires that in developing, implementing and assessing prevention approaches, initiatives be based on "accurate empirical data"[45] and targeted to those most at risk of trafficking in persons.[46] For example, mass migration crises result in the concentration of a large number of displaced vulnerable populations in few places, making them a prime

[39] See, e.g., A/HRC/23/49, para. 70 ("There is a need to create a framework for discussing the responsibility of States to act with due diligence, by separating the due diligence standard into two categories: individual due diligence and systemic due diligence.").
[40] See generally A/HRC/23/48, para. 84.
[41] A/HRC/26/37, para. 55.
[42] A/HRC/23/48, para. 84.
[43] Ibid., para. 62.
[44] See, e.g., *Rantsev v. Cyprus and Russia* (2010), para. 284.
[45] E/CN.4/2006/61, para. 37.
[46] See, e.g., *Jessica Lenahan (Gonzales) v. United States* (2011), para. 127; A/HRC/14/L.9/Rev.1, para. 11.

target for traffickers. Prevention policies should mitigate these risks, including through providing comprehensive and innovative regulated mobility avenues in order to prevent recourse of migrants to smugglers in the first place.[47] Additionally, in crisis situations such as armed conflicts, natural disasters and protracted crises, it is vulnerable and mobile populations such as "irregular migrants, migrant workers, asylum seekers and displaced populations (refugees and internally displace) persons) caught up in a crisis, or in transit, people left behind and local communities"[48] that are most at risk of trafficking in persons. Good State practices to address these risks before crisis can include, for example, ensuring livelihood activities to reduce the vulnerabilities to trafficking in persons and exploitation for at-risk populations.[49]

22. Good practices in prevention should also address all types of trafficking. For example, good practices to combat trafficking in persons for the purpose of domestic servitude in diplomatic households include that undertaken in Austria, where authorities request that foreigners who seek to work for a diplomatic household have a written contract that complies with Austrian labour law. Workers must also apply in person for a diplomatic legitimation card, giving Austrian authorities, "an opportunity to interview the applicants, examine their work contracts, and inform them of their rights and obligations while in Austria and of the contact details of NGOs which could be of assistance."[50] Good practices to prevent labour trafficking include States regulating the supply of workers to sectors by controlling the licensing of employment agencies working in these fields. For example, in the United Kingdom, the Gangmasters Licensing Authority regulates the supply of workers in certain labour-intensive industries (e.g., agriculture, horticulture, forestry, fishing, food processing).[51]

23. In understanding the due diligence obligation to prevent trafficking in persons, there are also useful interactions with human rights due diligence standards in other contexts. For example, the Inter-American Court of Human Rights in the Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion (2003) clarifies States' due diligence obligations concerning migrant workers, noting that migratory status can never be a justification for depriving individuals of the enjoyment and exercise of human rights, including those related to employment[52] and that the duty of due diligence requires States to "not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum

[47] Saving migrant lives is imperative but what next? — United Nations human rights experts ask European Union leaders (Apr. 24, 2015), available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15889&LangID=E#sthash.vEoTvteS.wzYOtDxm.dpuf.

[48] IOM, *Addressing Human Trafficking and Exploitation in times of Crisis — Evidence and recommendations for further action to protect vulnerable and mobile populations* 7 (2015).

[49] Ibid. at p. 10.

[50] Group of Experts on Action against Trafficking in Human Beings (GRETA), "Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Austria", para. 73 (2011), available at http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2011_10_FGR_AUT_en.pdf.

[51] GRETA, "Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom", para. 100 (2012), available at http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2012_6_FGR_GBR_en.pdf.

[52] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion, para. 133.

international standards."[53] There are also protections in other areas of international law that can complement these human rights obligations of due diligence. For example, article 2 of the Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29)[54] obligates State parties to prevent forced labour, including through "supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour."

B. Due diligence and the obligations to identify, assist and support victims

24. The present mandate holder has previously emphasized that States have a due diligence obligation to identify trafficked persons, which is foundational for ensuring many other aspects of a State's due diligence obligations with regard to trafficking in persons,[55] such as investigation and prosecution of traffickers, and assistance and protection for trafficked persons.[56] In practice, however, victim identification continues to be a huge hurdle in ensuring the rights of trafficked persons. The identification of victims is very often post hoc and too closely tied to the need to identify victims for criminal or immigration processes, rather than being pre-emptive in circumventing situations of exploitation that may increase susceptibility to trafficking.

25. Instead, a meaningful due diligence approach broadens the scope of identification to address a wider class of potential or presumed victims, as part of a comprehensive approach to prevention rather than a solely reactive or post-hoc due diligence measure. A wider and more pre-emptive approach necessarily involves a broader range of actors beyond law enforcement or border officials in identification. Good practices in this regard include involving actors such as labour and health and safety officials in identification of trafficking victims. Another good practice is for States to assign labour attachés to the staff of diplomatic missions, particularly in those countries that receive the largest number of a State's migrant workers. In order to facilitate victims' trust and identification — and subsequent protection and assistance — firewalls between certain areas (e.g., between enforcement of immigration laws and enforcement of labour laws) will often be necessary.

26. Additional good practices in this regard that have been previously identified by the present mandate holder include the use of mobile units in Italy "that ensure the presence of social services among populations at risk of exploitation, especially sex

[53] Ibid. at para. 148.

[54] P029 — Protocol of 2014 to the Forced Labour Convention, 1930. See also R203-Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203).

[55] A/HRC/17/35/Add.6, para. 65.

[56] The content of the due diligence obligation to identify victims of trafficking in persons has also been explicitly addressed by the dissent in the Committee on the Elimination of Discrimination against Women, Committee decision of *Zhen Zhen Zheng v. the Netherlands*, which stated that the Netherlands had failed to exercise due diligence as: "In the light of the nature of the crime of trafficking and the difficulty for victims, who are often uneducated and traumatized, to report precisely and with great details their experience, we are of the view that the Immigration and Naturalization Service did not act with the due diligence that the author's situation required by failing to recognize that she might have been a victim of trafficking in human beings and accordingly inform her of her rights" (*Zhen Zhen Zheng v. Netherlands*, para. 8.7).

workers"[57] and in the Bahamas, the opening of "channels of communication" between the Inter-Ministry Committee (the coordinating body for policy matters on trafficking in persons) and the Trafficking in Persons Task Force (the operational body for addressing trafficking in persons) "with the diplomatic and consular corps in the Bahamas, which have been encouraged to report any suspicion of trafficking cases."[58]

27. Victim identification under the rubric of prevention — as well as in the context of investigation, prosecution, protection and assistance — also requires greater training and understanding of the "continuum of exploitation" that exists between decent work and forced labour, such that workers experience different forms of exploitation that require different types of interventions when workers find themselves in any situation other than decent work.[59] In addition, training should address the relationship between different forms of transborder movement. For example, trafficking and smuggling are often treated distinctly when in practice they are often very linked, such that what was once an act of smuggling can be turned into an act of trafficking if the circumstances become more exploitative and involuntary.

28. As with all components of the due diligence standard, for due diligence requirements to be satisfied, the formal framework of protection and assistance established by the State must also be effective in practice.[60] While formalized structures are important, current anti-trafficking measures in many contexts have emphasized such generalized measures at the expense of tailored assistance and protection to individual victims. Instead, "individual due diligence" — measures to address individual victims — requires that States must act "flexibly", in ways that take into account the particular preference and needs of victims, including special account of the most vulnerable (e.g., children).[61]

C. Due diligence and criminalization, investigation, prosecution and punishment

29. The exercise of due diligence requires that remedies for victims be available and effective.[62] As well as being an obligation under article 5 of the United Nations Trafficking Protocol, the criminalization of trafficking is a core component of a State's due diligence obligations, including to protect victims, prevent future trafficking, and provide the necessary structures to investigate, prosecute and

[57] A/HRC/26/37/Add.4 (Apr. 1, 2014), para. 49.

[58] A/HRC/26/37/Add.5 (June 5, 2014), para. 75.

[59] Klara Skrivankova, "Between decent work and forced labour: examining the continuum of exploitation" (2010), available at http://www.jrf.org.uk/sites/files/jrf/forced-labour-exploitation-full.pdf.

[60] See, e.g., A/HRC/23/49, para. 15 ("For due diligence to be satisfied, the formal framework established by the State must also be effective in practice.").

[61] Ibid., para. 70 (noting that in addition to systemic measures, "Individual due diligence requires flexibility, as procedures taken in these instances must reflect the needs and preferences of the individuals harmed.").

[62] Ibid., paras. 72-75; E/CN.4/1996/53, para. 37. See also Hearing Submission: I, presented by the United Nations Special Rapporteur on violence against women, its causes and consequences to the Inter-American Commission on Human Rights 6 (Oct. 27, 2014).

adjudicate trafficking cases.[63] Accordingly, States also have due diligence obligations relating to the investigation and prosecution of suspected traffickers.[64] However, in practice, while more than 90 per cent of States have legislation criminalizing trafficking in persons, "this legislation does not always comply with the [United Nations Trafficking] Protocol, or does not cover all forms of trafficking and their victims, leaving far too many children, women and men vulnerable. Even where legislation is enacted, implementation often falls short."[65] Such problems in implementation constitute a failure of States' obligations to criminalize, investigate and punish trafficking in persons and deny victims access to justice. Particular gaps in criminalization also persist in the areas of trafficking for the purposes of organ removal and other forms of exploitation, including for committing crime, for begging, forced marriages and armed conflict.[66]

30. Human rights due diligence also requires effective investigation and prosecution that aims to avoid impunity, is independent, prompt and "must also be capable of leading to the identification and punishment of individuals responsible."[67] One example of effective due diligence practice in the investigation, prosecution and punishment of trafficking is enhanced cooperation between practitioners who are working to counter money laundering and trafficking in human beings, including by promoting the use of financial investigations linked with trafficking in persons-related offences.[68] For example, in the United States, authorities, in cooperation with banks and technology vendors, have established transaction-monitoring systems to capture transaction patterns and behaviour typical of human trafficking.[69]

31. In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, due diligence also means that States have a "duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories."[70] In order to comply with the exterritorial implementation of due diligence obligations, States should also, for example, incorporate extraterritorial jurisdiction into national legislation criminalizing trafficking and strengthen protections against trafficking in contracting or procurement practices for activities abroad. For example, Belize's Trafficking in Persons (Prohibition) Act 2013 gives extraterritorial jurisdiction if trafficking is committed by a Belizean

[63] See, e.g., OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary, 185 (2010) (Commentary on the Recommended Principles).

[64] Hearing Submission: *Jessica Lenahan (Gonzales) v. United States*, presented by the United Nations Special Rapporteur on violence against women, its causes and consequences to the Inter-American Commission on Human Rights 6, 7 (Oct. 27, 2014). See also A/HRC/23/49, para. 73; E/CN.4/2000/68, para. 53. See further *Rantsev v. Cyprus and Russia* (2010).

[65] United Nations Office on Drugs and Crime (UNODC), Global Report on Trafficking in Persons 1 (2014), available at: https://www.unodc.org/documents/data-and-analysis/glotip/GLOTIP_2014_full_report.pdf.

[66] Ibid. at p. 34.

[67] See, e.g., *Rantsev v. Cyprus and Russia* (2010), para. 233.

[68] Organization for Security and Cooperation in Europe (OSCE), *Leveraging Anti-Money Laundering Regimes to Combat Trafficking in Human Beings* (2014), available at: http://www.osce.org/secretariat/121125.

[69] UNODC, *The Role of Recruitment Fees and Abusive and Fraudulent Practices of Recruitment Agencies in Trafficking in Persons* 50 (2015), available at: https://www.unodc.org/documents/human-trafficking/2015/Recruitment_Fees_Report-Final-22_June_2015_AG_Final.pdf.

[70] *Rantsev v. Cyprus and Russia* (2010), para. 289.

national or a person who is resident in Belize.[71] The present mandate holder has also previously emphasized the need to "extend the national legislative prohibition on trafficking in persons for the removal of organs and related offences extraterritorially, irrespective of the legal status of the relevant acts in the country in which they occur."[72]

32. Due diligence also requires that prosecutorial discretion — including on issues such as what charges to file and how to allocate prosecutorial resources — should be used in ways that comply with human rights due diligence obligations. This includes ensuring full respect for the principle of non-punishment, such that victims of trafficking in persons should not be detained, charged or prosecuted for activities that are a direct consequence of their situation as trafficking in persons, including for illegal entry into, exit out of or stay in States of origin, transit or destination, or their engagement in other illegal activities, such as unauthorized work.[73] Instead, in practice, the principle of non-punishment is often incorrectly treated as a mitigating factor in punishment rather a full guarantee that victims will not be penalized for these activities as is required under a human rights-based approach to trafficking.

33. Human rights due diligence also requires that investigations and prosecution adopt gender-specific measures that take into account the different assistance and protection needs of women and men, girls and boys and overcome discriminatory barriers to accessing remedies, such as by preventing the introduction of discriminatory evidence in proceedings to determine the victim's right to redress and ensuring that complaint mechanisms and investigations into trafficking in persons incorporate specific positive measures that enable victims to come forward to seek and obtain redress.[74] States should also address other barriers that victims of trafficking in persons often face, including diplomatic immunity when domestic workers are in diplomatic households. Some countries, such as Switzerland and Belgium, have established a specific mediation mechanism to resolve labour conflicts arising between domestic workers and persons enjoying diplomatic privileges and immunities.[75] Trafficked persons, as well as their families and relevant witnesses, should be protected against unlawful interference with their privacy and safety before, during and after relevant proceedings.[76]

[71] A/HRC/26/37/Add.6, para. 72.

[72] A/68/256, para. 74.

[73] A/HRC/26/18, annex, para. 7(f); UNODC, Model Law against Trafficking in Persons (UNODC Model Law), arts. 10, 21(4); OHCHR Recommended Principles, Principle 7, Guidelines 2(5), 4(5), 5(5); United Nations, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on Trafficking in Persons, held in Vienna on 14 and 15 April 2009 (CTOC/COP/WG.4/2009/2, para. 12).

[74] A/HRC/26/18, annex, para. 7(h); Committee against Torture General Comment No. 3, para. 33.

[75] See OSCE, *How to prevent human trafficking for domestic servitude in diplomatic households and protect private domestic workers* 48, 65 (2014), available at: http://www.osce.org/handbook/domesticservitude?download=true.

[76] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, paras. 10, 12(b) (Basic Principles and Guidelines on the Right to a Remedy and Reparation); A/HRC/26/18, annex, para. 7(j); OHCHR Recommended Principles, Guidelines 4(10), 5(8), 6(6); UNODC Model Law, art. 21; United Nations Trafficking Protocol, arts. 6(1), 6(5).

D. Due diligence and remedies

34. Under international human rights law, States have an obligation to ensure a right to remedy for victims of human rights violations.[77] As noted earlier, the failure of States to exercise due diligence in relation to trafficking by non-State actors gives rise to an obligation to provide remedies;[78] in this respect, the due diligence principle is a "long-standing exception"[79] to the general rule that State responsibility is based on acts or omissions committed either by State actors or by actors whose actions are attributable to the State. In substance, adequate remedy or reparations include restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition.[80] The right to an effective remedy encompasses not only these substantive rights to remedies for the harm suffered, but also a set of procedural rights necessary to facilitate access to remedies.[81] Such remedies should have "transformative potential", meaning they should not be about returning individuals to the pre-trafficking context, but should "subvert instead of reinforce pre-existing patterns" that cause violations.[82]

35. The right to an effective remedy for victims of trafficking in persons should be interpreted and applied without discrimination, including to non-citizens.[83] A victim-centred and human rights-based approach to remedies centres the human rights of trafficked persons in all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.[84] This includes ensuring that anti-trafficking measures do not adversely impact the human rights of victims of trafficking in persons[85] and non-conditionality of victims' access to remedies, meaning that remedies, including assistance and protection, must not be dependent

[77] See, e.g., International Covenant on Civil and Political Rights, art. 2(3); Basic Principles and Guidelines on the Right to a Remedy and Reparation.

[78] See, e.g., Human Rights Council, General Comment No. 31, para. 8; Committee against Torture, General Comment No. 2, para. 18; Committee against Torture, General Comment No. 3, para. 7; A/HRC/26/18, annex, para. 2 (emphasis added) (This means that "all States, including countries of origin, transit and destination, shall provide adequate, effective and prompt remedies to victims of trafficking in persons, including non-citizens, within their territory and subject to their jurisdiction, when the State is legally responsible for any harm committed against them; this includes … when the State has failed to exercise due diligence to prevent trafficking, to investigate and prosecute traffickers, and to assist and protect victims of trafficking in persons.").

[79] A/HRC/23/49, para. 11.

[80] Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 18; A/HRC/26/18, annex. See also OHCHR Recommended Principles, Principle 17, Guideline 9(1).

[81] Committee against Torture, General Comment No. 3, para. 5; A/HRC/17/35, para. 17; A/HRC/26/18, annex, para. 5.

[82] A/HRC/23/49, para. 75.

[83] Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 25; A/HRC/26/18, annex, para. 4; OHCHR Recommended Principles, Guideline 1(4); UNODC Model Law, art. 3(2); Committee against Torture, General Comment No. 3, para. 32; United Nations Trafficking Protocol, art. 14(2).

[84] OHCHR Recommended Principles, Principle 1, Guideline 1; A/HRC/26/18, annex, para. 5.

[85] OHCHR Recommended Principles, Principle 3, Guideline 1; Basic Principles and Guidelines on the Right to a Remedy and Reparation, paras. 10, 25.

on the victim's willingness to cooperate with authorities.[86] For example, in Moldova the Government provides a minimum assistance package that includes physical, psychological and social recovery measures, where access to "assistance should not be dependent on the victim's willingness to participate in the prosecution of traffickers."[87]

36. The rapid and accurate identification of victims of trafficking in persons — as well as being part of a State's prevention obligation — is also an essential prerequisite to realize the right to remedy.[88] As such, the detention of victims of trafficking in persons, for example as smuggled or irregular migrants or undocumented migrant workers or as sex workers, constitutes a failure of this obligation to identify victims and denies them access to an effective remedy.[89] While trafficked persons have a right to safely remain in the country pending the completion of relevant proceedings[90] — including to participate in such proceedings — States should also ensure that a victim's immigration status or absence of the victim from the jurisdiction does not preclude enjoyment of the right to remedy.[91]

E. Due diligence and inter-State cooperation and institutions

37. Due diligence in human rights has tended to be quite State-centric.[92] However, increasingly in human rights, due diligence also shapes or influences the activities of inter-State and non-State entities. The transnational nature of human trafficking means that in practice States often cannot meet their due diligence obligations to prevent, investigate and punish trafficking, and assist victims, without cooperating with other countries, whether through existing mechanisms (e.g., mutual legal assistance or extradition agreements or cooperative arrangements mandated by the United Nations Trafficking Protocol and the Convention against Transnational Organized Crime) or through new forms of cooperation that are developed to address the demands of due diligence in a specific trafficking situation. The territorial and extraterritorial application of human rights — including the due diligence principle — means that in some cases States may have concurrent, and

[86] UNODC, Legislative guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2004, para. 62; OHCHR Recommended Principles, Principle 8; UNODC Model Law, art. 20(1); OHCHR, Commentary on the Recommended Principles (2010), 142-143; A/HRC/26/18, annex, para. 7(i).

[87] GRETA, "Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Republic of Moldova" 114 (2012) available at http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2011_25_FGR_MDA_en.pdf.

[88] OHCHR Recommended Principles, Guidelines 2(1)-(4), 5(7), 8(2); UNODC Model Law, art. 18; A/HRC/26/18, annex, para. 7(b).

[89] OHCHR Recommended Principles, Guideline 2(6); OHCHR, Commentary on the Recommended Principles (2010), 129.

[90] OHCHR Recommended Principles, Principle 9, Guidelines 4(7) and 9(3); UNODC Model Law, art. 31; United Nations Trafficking Protocol, arts. 6(2), 8(2); Organized Crime Convention, art. 25(3).

[91] UNODC Model Law, arts. 27(3), 28(5); A/HRC/26/18, annex, para. 7(g).

[92] See, e.g., E/CN.4/2006/61, para. 15 ("the exclusively State-centric nature of the due diligence obligation has failed to take into account the changing power dynamics and the challenges these pose for State authority as well as the new questions they raise about accountability.").

potentially overlapping obligations of due diligence for trafficking in persons.[93] In such cases, States should utilize all means available to coordinate and cooperate in anti-trafficking efforts in ways that are also consistent with their other obligations of international cooperation (e.g., under the United Nations Trafficking Protocol and the Convention against Transnational Organized Crime).

38. In addition to improved inter-State cooperation, greater legal and policy coherence on human rights due diligence is also needed where States participate in intergovernmental institutions or entities, including international trade and financial institutions. While States retain their international human rights law obligations of due diligence when they participate in such institutions,[94] inter-State organizations should also embed due diligence in their governance activities, including in procurement practices and particularly in post-conflict situations.[95] The United Nations human rights due diligence policy on United Nations support to non-United Nations security forces that "sets out measures that all United Nations entities must take in order to ensure that any support that they may provide to non-United Nations forces is consistent with the purposes and principles as set out in the Charter of the United Nations and with its responsibility to respect, promote and encourage respect for international humanitarian, human rights and refugee law" is one example.[96]

39. As with individual States' overreliance on post-hoc measures such as investigation and prosecution, measures such as ombudspersons and internal evaluation offices that examine policies and activities (e.g., of the United Nations, the International Monetary Fund and the World Bank) are "positive steps" but are "reactive and cause(s) further reliance on the responsibility arm of due diligence rather than the practice and long-term processes that are necessary."[97] Instead, the humanitarian community, United Nations system, and donor community should, for example, undertake anti-trafficking responses before, during and after crisis moments in order to fully address the "relationship between pre-existing trafficking patterns and the heightened risks and vulnerabilities during crises."[98]

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[93] Ibid. at para. 34 ("The State cannot delegate its obligation to exercise due diligence, even in situations where certain functions are being performed by another State or by a non-State actor. It is the territorial State as well as any other States exercising jurisdiction or effective control in the territory that remain, in the end, ultimately responsible for ensuring that obligations of due diligence are met. Related to this point is the notion that due diligence may imply extraterritorial obligations for States that are exercising jurisdiction and effective control abroad.").

[94] Committee on the Elimination of Discrimination against Women, General Recommendation No. 30, para. 13; E/CN.4/2006/61, para. 97 ("International financial organizations also have obligations of due diligence in relation to preventing and responding to violence and other forms of discrimination against women.") and para. 98 ("Similarly, the United Nations system is obligated to respect and uphold the principles of the Organization ... they also have additional duties to cooperate and to establish coherent inter-agency strategies to work towards the elimination of violence against women in close collaboration with local communities and relevant civil society groups. The responsibilities of these organizations are in addition to the individual responsibilities of the States that are members of such organization.").

[95] See O'Donoghue, in *International Law and Post-Conflict Reconstruction Policy* (2015).

[96] Human rights due diligence policy on United Nations support to non-United Nations security forces (A/67/775-S/2013/110) 890.

[97] O'Donoghue, in *International Law and Post-Conflict Reconstruction Policy* 65 (2015).

[98] IOM, *Addressing Human Trafficking and Exploitation in times of Crisis — Evidence and recommendations for further action to protect vulnerable and mobile populations* 10 (2015).

F. Due diligence and non-State actors such as business enterprises

40. Human rights due diligence on trafficking is also relevant in the activities of non-State actors, such as business enterprises, trade unions and employer organizations. As with all other non-State actors, States have an obligation to exercise due diligence to prevent, investigate and punish trafficking through their laws and policies toward business entities.[99] This includes, for example, general rules requiring that businesses respect human rights and mandating that they undertake some form of human rights due diligence, as well as specific conditions on how States will conduct commercial transactions with business enterprises, including in their public procurement activities (e.g., by including a zero tolerance policy towards trafficking in contractual clauses and more generally revising public procurement procedures to prevent abusive and fraudulent recruitment).[100] Other good practices include that in Brazil, where the Government "maintains public records of individuals and corporations identified by labour inspectors to be using or to have used slave labour", who then subsequently "face financial sanctions, including fines and denial of national subsidies, tax exemptions and loans from State banks."[101] Disclosure requirements in domestic legislation that mandate companies to make their anti-trafficking policy, if they have one, transparent,[102] is a recent form of State practice that could be strengthened by mandating that companies have such anti-trafficking policies in place and report on their implementation. Recruitment agency licensing to regulate recruitment practices and to require that workers are not charged recruitment fees can be a particularly effective form of State practice to reduce the vulnerability of migrants to trafficking. For example, "some countries in the Americas, including Peru, have explicitly prohibited recruitment agencies from engaging in trafficking and from charging workers any recruitment fees".[103] Additionally, Indonesia and Nepal, "alongside a licensing process, there is a system by which workers can report abuses committed by recruitment agencies to the government."[104]

41. It is also important to recall that in cases where a business enterprise is controlled by the State or where its acts can be otherwise attributed to the State, the relevant standard is not one of due diligence towards private actors but whether the abuse of human rights by the business enterprise entails a violation of the State's international law obligations to respect, protect and fulfil human rights.[105]

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[99] United Nations Guiding Principles on Business and Human Rights (2011), Principle 1.

[100] Ibid., Principles 5 and 6. See also *Rantsev v. Cyprus and Russia* (2010), para. 284 (positive obligations also require "adequate measures regulating businesses often used as a cover for human trafficking.").

[101] A/67/261, para. 20.

[102] See, e.g., De Schutter et al., *Human Rights Due Diligence: The Role of States*, 43-48 (2012).

[103] UNODC, *The Role of Recruitment Fees and Abusive and Fraudulent Practices of Recruitment Agencies in Trafficking in Persons* 36 (2015).

[104] Ibid. at pp. 34-35.

[105] United Nations Guiding Principles on Business and Human Rights (2011), Principle 4 Commentary ("Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations.").

42. The term due diligence is now often used in reference to the "human rights due diligence process" of corporations to respect human rights.[106] This "human rights due diligence process" is understood within the business community as a voluntary commitment or "expected conduct"[107] that is a core component of the responsibility of business enterprises to respect human rights that extends beyond the activities of the core company to include harmful activities of affiliates and of business relations, including those down the supply chain.[108] Such a human rights due diligence process should "identify, prevent, mitigate and account for how they address their impacts on human rights", including by "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed".[109] The present mandate holder has accordingly previously developed a set of indicators and benchmarks as a "valuable tool for businesses to help them to exercise due diligence, in accordance with the United Nations Guiding Principles on Business and Human Rights, in their supply chains in order to detect and prevent trafficking cases" which will not be repeated in their entirety here.[110] In "many cases," global companies do have in place "corporate-level policies, and supplier codes of conduct that include a clear prohibition of forced labour and human trafficking" and provide communication and training initiatives to suppliers on these policies that can include information on compliance benchmarks and reporting requirements.[111] While such activities should be conducted in relation to all operations in the corporation's supply chain, corporations should particularly target those countries and business processes that constitute a particular risk for trafficking in persons (e.g., in crisis locations). Additionally, corporations should ensure that "traditional" strategies in corporate social responsibility are adapted to the realities of human trafficking. For example, corporations' use of "social audits" to assess working conditions at their own factories or facilities and those of their suppliers tend not to investigate how workers got their jobs (e.g., through a third party broker).[112] In order to detect workers' susceptibility to trafficking before arriving at a workplace, corporations "must gain an understanding of both their product and labour supply chains, and develop systems to obtain information and transparency on recruitment agencies and practices".[112]

V. Recommendations

43. **Under international law, States are required to exercise due diligence to prevent trafficking, to investigate and prosecute traffickers, to assist and protect victims of trafficking in persons and to ensure remedies.**

44. **States that have failed to exercise due diligence to address trafficking by non-State actors incur international responsibility that requires them to provide an effective remedy for victims of trafficking in persons. In substance,**

[106] United Nations Guiding Principles on Business and Human Rights (2011), Principles 15(b), 17, 18-21.
[107] Ibid., Principle 11 Commentary.
[108] Ibid., Principle 17 and Commentary.
[109] Ibid., Principles 15(b), 17.
[110] A/HRC/23/48/Add.4. See also A/67/261.
[111] UNODC, *The Role of Recruitment Fees and Abusive and Fraudulent Practices of Recruitment Agencies in Trafficking in Persons* 60 (2015).
[112] Ibid. at p. 61.

adequate remedy or reparations include restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. The right to an effective remedy encompasses not only these substantive rights to remedies for the harm suffered, but also a set of procedural rights necessary to facilitate access to remedies.

45. Due diligence requires States to take a comprehensive, integrated and holistic approach to ensuring the human rights of trafficked persons and persons at risk of being trafficked. Meaningful and substantive human rights due diligence provides a necessary framework to ensure policy coherence between anti-trafficking policy and related policy areas such as immigration and labour market policies.

46. Both the territorial State and any other States exercising jurisdiction are responsible for meeting due diligence obligations. States' extraterritorial due diligence obligations are particularly important in the context of cases of transnational trafficking. States' obligations of due diligence continue in crisis contexts and under certain circumstances, non-State actors (e.g., armed groups) may also have such obligations.

47. While due diligence does not require uniform outcomes from differently situated States, as an obligation of conduct that must be exercised in good faith, it does require States to take reasonable measures that have a real prospect of altering outcomes or mitigating harms and to assess their effectiveness. Often it is not more resources but rather their reallocation — including towards preventative policies — that is needed for States to act diligently as assessed under the particular circumstances.

48. Due diligence to prevent trafficking requires action to address the wider, more systemic processes or root causes that contribute to trafficking in persons, such as inequality, restrictive immigration policies, and unfair labour conditions, particularly for migrant workers. Due diligence requires that in developing, implementing and assessing prevention approaches, initiatives be based on accurate data and targeted to those most at risk of trafficking in persons.

49. Due diligence in identifying victims should be pre-emptive and addressed to a wide range of actual and potential victims rather than a post-hoc measure tied to criminal processes. Due diligence in assisting and protecting victims should be tailored to their individual preferences and needs and not conditional on their cooperation with authorities.

50. Due diligence in the criminalization, investigation, prosecution and punishment of trafficking requires that laws criminalize all forms of trafficking, including for the purposes of organ removal and other forms of exploitation, including for committing crime, for begging, forced marriages and armed conflict. The extraterritorial application of due diligence obligations is furthered by measures such as incorporating extraterritorial jurisdiction into national legislation criminalizing trafficking and through inter-State cooperation in trafficking cases.

51. Due diligence in the criminalization, investigation, prosecution and punishment of trafficking also requires that investigatory and prosecutorial action must be independent, prompt and capable of leading to the identification

and punishment of responsible individuals, including through the use of financial investigation.

52. **Due diligence requires respect for the principle of non-punishment of victims as well as the removal of barriers in access to justice, including any limitations regarding residence or other personal status. This includes the adoption of gender-specific measures that take into account the different assistance and protection needs of women and men, girls, and boys and overcome discriminatory barriers to accessing remedies.**

53. **In addition to the obligations of due diligence of individual States when they participate in inter-State institutions such as the international financial institutions, inter-State organizations should also embed due diligence in their governance activities, including in procurement practices and particularly in post-conflict situations.**

54. **Non-State actors, such as business enterprises, themselves have a role in the due diligence framework, including through a voluntary "human rights due diligence process" pursuant to the soft law "responsibility to respect" framework that applies for corporations or through international human rights obligations under certain circumstances.**